

California Political Attorneys Association

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September 13, 2010

Chairman Dan Schnur
Fair Political Practices Commission
428 "J" Street, Suite 620
Sacramento, CA 95814

Re: Posting of Pending Investigations

Dear Chairman Schnur:

The members of the California Political Attorneys Association (CPAA) have serious concerns regarding the FPPC's recently announced policy of confirming, upon request, whether or not an investigation is pending, as well as its proposal to modify the policy by proactively identifying the subjects of *all* pending investigations on the Commission's website. We believe that the Commission *and* the regulated community would benefit by a thorough and public opportunity to reconsider the wisdom of the policy, as well as the proposed modification.

By confirming that a candidate is under investigation, the FPPC gives its imprimatur to mere allegations of wrongdoing and risks injecting itself into a political campaign. Historically, the FPPC, like other political campaign enforcement agencies, has refused to become a pawn in elections by declining to comment on pending investigations. Under the current policy, by contrast, the Commission gives credence to allegations, subject only to a cursory 14-day review, by confirming, when requested, that an investigation is under way. We understand that this policy has led to inconsistency because investigations are only made public if someone asks. However, your proposal to address this inconsistency by disclosing the targets of all pending investigations on the Commission's website only heightens our concerns over the existing policy, the adoption of which we vigorously opposed. Publicly posting a list of pending investigations makes it all but certain that the FPPC will become a pawn in political campaigns, rather than leaving it to a chance request.

This is particularly disturbing to us because it creates a risk that allegations, which after a thorough investigation conducted post-election are deemed to be unfounded, could have a determinative effect on the outcome of an election. It is not difficult to conceive of future mailers and television ads that feature a screen print from the "investigations" page of the FPPC's website with a banner headline "Candidate X is under investigation for misusing

campaign funds. If we can't trust him with his own money, how can we trust him with ours?" There is no doubt that this policy will lead to the filing of numerous complaints for the sole purpose of drawing the FPPC into a pitched political battle.

Web posting of complaints is particularly worrisome in the conflict of interest context, which accounts for a large percentage of enforcement complaints. The conflict of interest regulations are complex enough that it is frequently difficult to reject a complaint within the 14 days even if the complaint is not meritorious. Many of these complaints involve volunteer local officials who do not routinely hire their own counsel. A local official who is the subject of a conflict of interest case may have his or her reputation damaged as the publicly-identified subject of an FPPC investigation in cases where the complaint is quickly dismissed after staff has the opportunity to analyze the facts and allegations.

The Commission's policy and your proposed modification also raise serious due process concerns. This "scarlet letter" approach to enforcement deprives the subject of an investigation of notice and an opportunity to be heard before the allegations are made public. The policy has the practical effect of turning the doctrine of "innocent before proven guilty" on its head. It also would eviscerate Section 83115.5 of the Act, which mandates notice to a Respondent 21 days before the FPPC's "consideration" of an alleged violation at a *private* probable cause hearing. The Respondent must be given a summary of the evidence, informed of his or her right to be present in person and to be represented by counsel. This provision was intended to prevent the FPPC from publicizing charges against a public official until the official has an opportunity to rebut them.

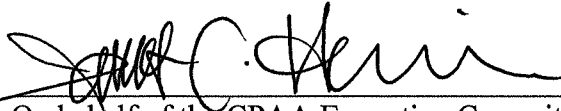
In light of these concerns, we respectfully request that the Commission refrain from implementing the proposed modification to the policy until it has had an opportunity to analyze these concerns and reconsider the wisdom of the underlying policy. State and many local elections are less than 60 days away. If the Commission ultimately concludes, after a public meeting, that the policy and the proposed modification are the right course to take, there will be ample time after the election to implement them. On the other hand, if the Commission were to implement this change now before it has had the opportunity to fully and publicly vet these issues, it could have negative consequences for the regulated community and for the Commission's reputation as a neutral arbiter.

While members of the public and the CPAA may make public comments regarding this issue at the Commission's September meeting, we request that the Commission formally notice the reconsideration of the policy and its modification for public consideration at its October meeting.

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Thank you for your consideration of this important matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "James C. Harrison", is written over a horizontal line.

On behalf of the CPAA Executive Committee:

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cc: Commissioners Garrett, Hodson, Montgomery and Rotunda
CPAA Members
The Sacramento Bee